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CHARLES ELMO

No. 390

Supreme Court of the United States

OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

against

VALENTIN ENCARNACION,

Respondent.

NOTICE, PETITION AND PETITIONERS' BRIEF ON APPLICATION FOR A WRIT OF CERTIORARI.

JAMES B. HENNEY,
Solicitor and Counsel for the Petitioners,
100 William Street,
Borough of Manhattan,
New York City.

JAMES B. HENNEY,
DANIEL MINER,
Of Counsel.

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INDEX.

QUESTIONS INVOLVED

PAGE

FIRST:— Whether the construction placed by the Court of Appeals of the State of New York upon the Federal Employers Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1) is not directly contrary to that given to it by the United States Supreme Court 3

SECOND:— Whether an assault by a foreman of a stevedore under him while loading a barge in navigable waters, without any proof of negligence imposes liability on the Employer of the Stevedore under the Federal Employers Liability Act made applicable to seamen by the Jones Act, Merchants Marine Act of June 5th, 1920 (45 Stat. Ch. 149, Section 53)..... 4

THIRD:— Whether a stevedore loading a barge in navigable waters, is entitled to the classification as a seaman where it does not appear that the barge is being used in loading or unloading a vessel or that any crew of seamen are employed on the barge 4

STATUTES INVOLVED

Federal Employers Liability Act 4

Jones Act 5

Facts 5-8

The Assault 6

QUESTIONS DISCUSSED

PAGE

The Federal Employers Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1) United States Code, Title 45, Section 51, made applicable to seamen by Merchants Marine Act of June 5th, 1920 (45 Stat. Ch. 149, Section 53) United States Code, Title 46, Section 688, known as the Jones Law does not extend the employers liability to a wilful assault of a workman by his foreman 12

The Court of Appeals has added a cause of action due to misconduct to the Federal Employers Liability Act 14

Extracts from the Court of Appeals' opinion.... 14–17

The Federal Employers Liability Act creates a new obligation, in the event of negligence and the courts cannot extend such obligation to cover misconduct 19

The Federal Employers Liability Act "unmistakably" bases the employers liability on negligence and no words can be read into it by implication to alter its express meaning 19

No words extending its application can by implication be read into the statute 20

The Courts may not read additional words into an unambiguous statute on the theory that Congress must have intended to make the statute cover this added subject 21

When Congress by amendment of the Jones Law extended, the rights under the Federal Employers Liability Act to seamen, it thereby ratified the construction of the Courts, that the cause of action erected was founded solely on negligence 24

PAGE

Negligence of the Employer or of its officers, agents or employees is essential to a recovery.. 26

The decision of this Court in International Stevedoring Co. *v.* Haverty, 272 U. S. 50, relied upon by the Court of Appeals as controlling authority in this court in favor of the cause of action in the suit at bar, does not sustain the Court of Appeals' ruling 26

Gabrielson *vs.* Waydell, 67 Fed. Rep. 342, distinguished 28

There is no evidence that the barge the respondent was loading was being used in connection with the loading or unloading of any vessel employing seamen, or that seamen were employed on the barge, therefore, he is not shown to have been enaged in seamen's work and is not entitled to the benefits of the Federal Employers Liability Act 29

Because of the importance of the questions involved to employers of seamen and all interstate railway carriers by the extension of this Act of Congress by the Court of Appeals beyond any construction placed upon this Act by this Court, and in apparent conflict with the Statute and the decisions of this Court, your petitioners ask that a writ of certiorari be granted. 30

AUTHORITIES

	PAGE
American Express Co. *vs.* United States, 212 U. S. 522, 534, 535	20
Barnet *vs.* National Bank, 98 U. S. 555, 558	19
Cain *vs.* Alpha Steamship Corp. decided Aug. 19th, 1929	12
Chesapeake & Ohio R. R. Co. *vs.* Stapleton not yet officially reported	18
Copper Queen Mining Co. *vs.* Arizona Board, 206 U. S. 474, 479	24
Dewey *vs.* United States, 178 U. S. 510, 520, 521	20, 21
Gabrielson *vs.* Waydell, 67 Fed. Rep. 342	28
International Stevedoring Co. *vs.* Haverty, 272 U. S. 50	26
Kepner *vs.* United States, 195 U. S. 100, 125	20
Lake Country *vs.* Rolkies, 130 U. S. 662	19
Marvil *vs.* Merritt Collection, 116 U. S. 11	20
New Haven R. R. *vs.* Industrial Com. Com., 200 U. S. 361, 401, 402	24
Newhill *vs.* Sanger, 92 U. S. 761, 765	23
Seaboard Air Line *vs.* Horton, 233 U. S. 492	25
Southern Railway *vs.* Gray, 241 U. S. 333, 339	26
Shaw *vs.* Railroad Co., 101 U. S. 557, 561	19
United States *vs.* B. & O. South Western R. R. 222 U. S. 13	20
United States *vs.* Chase, 135 U. S. 255, 261	20, 22
United States *vs.* Sheldon, 2 Wheat. 119	23
United States *vs.* Wiltberger, 5 Wheat. 76, 95	23
United States *vs.* Morris, 14 Pet. 464, 475	23
United States *vs.* Hartwell, 6 Wall. 385	23
United States *vs.* Reese, 92 U. S. 214	23
United States *vs.* Goldberg, 168 U. S. 95, 103	23
Yerke *vs.* United States, 173 U. S. 439, 442	19

Supreme Court of the United States,

OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

against

VALENTIN ENCARNACION,

Respondent.

PLEASE TAKE NOTICE, that upon the annexed petition of INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GEOTZINGER, as executrix and executors of William A. Jamison, deceased, and a certified copy of the entire transcript of record in this cause, including the proceedings in the Court of Appeals of the State of New York, and the Appellate Division of the Supreme Court, Second Department, which are the highest courts in which a decision of this cause could be had, submitted herewith, and the petitioners' brief hereto annexed, also to be submitted on the presentation of the petition, an application will be made to the Supreme Court of the United States at a session of said Court, appointed to be held at the Capitol, Washington, D. C., on the 7th day of October, 1929, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for a Writ of Certiorari, to be directed to the Supreme Court of the State of New York, Kings County, wherein the record is now

lodged to review the final determination herein of the Court of Appeals of the State of New York, the highest Court of the State of New York having jurisdiction in the premises, and the judgment of the Supreme Court of New York entered upon the order of the Court of Appeals.

Dated, New York, September 9th, 1929.

JAMES B. HENNEY,
Solicitor and Counsel for Petitioners,
Office & P. O. Address,
100 William Street,
Borough of Manhattan,
City of New York.

To:

MIELE & CASTELLANO, Esqs.,
Attorneys for VALENTIN ENCARNACION,
Office & P. O. Address,
299 Broadway,
Borough of Manhattan,
City of New York.

The Clerk of the County of Kings.

Supreme Court of the United States,

OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN, and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,
Petitioners,

against

VALENTIN ENCARNACION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named, INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, as Executrix and Executors of William A. Jamison, deceased, pray for a Writ of Certiorari to review the determination hereinafter described of the highest Court of the State of New York, having jurisdiction in the premises, and respectfully show:

The Questions Involved.

The questions presented are:

FIRST:—Whether the construction placed by the Court of Appeals of the State of New York upon the Federal Employer's Liability Act, United States Code, Title 45, Section 51, is not directly contrary to that given to it by the United States Supreme Court.

SECOND:—Whether, an assault by a foreman of a Stevedore under him, while loading a barge in navigable waters, without any proof of negligence, imposes liability on the Employer of the stevedore under the Federal Employers Liability Act, made applicable to seamen by the Jones Act, Title 46, Section 688.

THIRD:—Whether a stevedore, loading a barge in navigable waters, is entitled to the classification as a seaman where it does not appear that the barge was being used in loading or unloading a vessel, or that any crew of seamen is employed on the barge.

The Statutes Involved.

The provision of the Federal Employers Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1), so far as pertinent is as follows:

> "Liability of Common Carriers by Railroad, in Inter-State or Foreign Commerce, for injuries to Employees from Negligence.—Every common carrier by railroad while engaging in commerce between any of the several states or territories
>
> . . . . . .
>
> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." (Apr. 22, 1908, c. 149 § 1, 35, Stat. 65.)

This Statute is made applicable to seamen by the amendment of 1920 to the Jones Act, Merchants Marine Act of June 5th, 1920 (41 Stat. Ch. 250, Section 53) which is as follows:

> "Recovery for Injury to or Death of seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all Statutes of the United States modifying or extending the Common Law Right or remedy in cases of personal injury to railway employees shall apply;"

The opinion of the Court of Appeals is reported in 251 N. Y. 213.

Facts.

1. The assault occurred on or about the 19th day of May, 1925.

2. This action was commenced by the service of the summons on the petitioners' testator, William A. Jamison, on the 20th day of November, 1925.

3. Christina Arbuckle, named in the summons as a defendant, was not served, and did not appear upon the trial.

4. Thereafter, James B. Henney served a notice of appearance as attorney for the defendant, William A. Jamison. The complaint in the action was thereafter served on the attorney for said defendant, who served an answer to the complaint in said action in behalf of the petitioners' testator, William A. Jamison, which alleged a general denial.

5. The complaint alleged that the plaintiff was a longshoreman employed by the defendant therein named, and at the time mentioned, was loading a barge in navigable waters. That while the plaintiff was at work, his foreman assaulted him, as a result of which he sustained a fractured skull. That this foreman was delegated by the defendant to

"give orders to the plaintiff and his fellow workers while working on said barge."

No other cause of action is alleged in the complaint, there is no negligence on the part of the defendant alleged or claimed.

6. On the 9th day of March, 1928, the action was tried before the Honorable Harry E. Lewis, Justice, and a jury, in the Supreme Court, Kings County, New York, on the issues raised by said complaint, and answer.

7. The plaintiff did not prove, nor did it appear on the trial that the employee committing the assault had shown any vicious or dangerous tendencies at any time before this assault.

8. No negligence was proved or attempted to be proved upon the trial.

9. The plaintiff produced evidence that the plaintiff was a stevedore in the employ of Arbuckle Brothers, under which name the defendant did business. That on the day of the assault he was loading a barge in the river off of Jay Street, when his foreman called to him to "hurry up". That the plaintiff told him to leave him alone, that he knew what work to do. Whereupon, the foreman struck him over the eye and he fell to the floor. The plaintiff's medical witness testified that he had a fractured skull and jaw.

10. The Trial Judge charged the jury that

> "The law is that the master is not liable for every assault committed by his servant. The master is liable only when the acts of the Employee are within the scope of his employment. It does not make any difference that the acts are done while the work is being prosecuted. That is not the test. The test is whether they are done by the servant in furtherance of the master's business and are such as can fairly be said to have been authorized by the master,—and by authorization is not meant expressly conferred—and whether they are such as are incident to the performance of the duties entrusted to the foreman by the master."

The Court did not submit to the jury the facts essential to a recovery under the Federal Employers Liability Act.

11. The defendant moved to dismiss the complaint at the close of the plaintiff's case and at the close of all the evidence on the ground that the act committed was that of a fellow servant acting without the scope of his employment, which motions were denied over the defendant's exceptions.

12. The jury awarded the plaintiff a verdict for $2500. upon which judgment was entered.

13. The Appellate Division of the Supreme Court of the State of New York reversed the judgment and dismissed the complaint, holding that the defendant's testator, William A. Jamison, the plaintiff's employer was not responsible for a willful assault committed by his foreman.

14. William A. Jamison, the sole defendant, appearing or answering the complaint, died on June 27th, 1929.

15. The death of the petitioner's testator, William A. Jamison, was not known to his attorney in this action, until the appeal had been argued in the Court of Appeals, when it was discovered and communicated to the plaintiff's attorney, and on his motion, the Court of Appeals permitted the petitioners to be substituted as parties defendant, and reversed the judgment of the Appellate Division, and reinstated the judgment of the Supreme Court, at Trial Term.

The Order and Remittitur of the Court of Appeals is dated July 11th, 1929. The judgment of the New York Supreme Court entered thereon was entered on August 8th, 1929.

16. The Court of Appeals held that there was no negligence on the part of the master proved, but construed the provision of the Federal Employers Liability Act which make the master's liability depend specifically upon negligence, to include liability for misconduct on

the part of foreman and as so construed, applied it under the Jones Act to seamen.

17. The petitioners now seek to review the final determination of the Court of Appeals of the State of New York that the Federal Employers Liability Act creates liability on the part of the employers, for misconduct of his foreman in assaulting an employee under him, when such misconduct does not constitute negligence, and further that the respondent was not performing work which brought him within the provisions of the Jones Law, Title 46, Section 688.

18. A transcript of the record of the case including the proceedings of the Court of Appeals and the Appellate Division of the Supreme Court, Second Department of the State of New York accompanies this petition.

WHEREFORE, your petitioners pray that a Writ of Certiorari may issue out of and under the seal of this court directed to the Supreme Court of the State of New York, Kings County, commanding said Court to certify this case to this court for review and determination as provided by the Act of Congress known as the Judicial Code and that your petitioners may have such other and further relief in the premises, as to the Court may seem appropriate and in conformity with said Act,

And your petitioners will forever pray

INEZ M. JAMISON,
WILLIAM N. DYKMAN,
MARTIN E. GOETZINGER,
as Executrix and Executors of
William A. Jamison, deceased,
by JAMES B. HENNEY,
their Solicitor and Counsel.

JAMES B. HENNEY,
Solicitor and Counsel.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

JAMES B. HENNEY, being duly sworn, says that he is the solicitor and Counsel herein of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof, and that the facts as stated are true to the best of his knowledge and belief.

JAMES B. HENNEY.

Sworn to before me this
9th day of September, 1929.
PAUL D. CARRIGG
Notary Public, New York County
New York Co. Clk's No. 446, Reg. No. 0-554
Kings Co. Clk's No. 196, Reg. No. 444
Bronx Co. Clk's No. 46, Reg. No. 3045-A
Queens Co. Clk's No. 1098, Reg. No. 3435
Commission Expires March 30, 1930
[SEAL]

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the foregoing petition for a Writ of Certiorari is well founded in law.

JAMES B. HENNEY.

Supreme Court of the United States,
OCTOBER TERM—1929.

INEZ M. JAMISON, WILLIAM N. DYKMAN and MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,
Petitioners,
against
VALENTIN ENCARNACION,
Respondent.

PETITIONERS' BRIEF ON APPLICATION FOR A WRIT OF CERTIORARI.

The Assault.

The plaintiff testified as follows:

Q. And was Frank there as your foreman since seven o'clock in the morning, too? A. Yes; seven o'clock the superintendent, and then it was Frank.

Q. First the superintendent, and then he brought Frank? A. Yes.

Q. How long was Frank working on May 19, 1925? A. Five or six months.

Q. On that day did he start to work with you at seven o'clock in the morning? A. Yes.

Q. About eleven o'clock or half-past eleven in the morning what happened? A. I worked, and he come and hollered to me and called me some name.

Q. What kind of work were you doing? A. Stevedore.

Q. What kind of stevedoring work were you doing? A. Everything.

Q. Were you loading or unloading barges? A. Loading barges.

By the Court:

Q. What did he say? A. He called me and said "Hurry up, you black bastard son-of-a-bitch."

By Mr. Castellano:

Q. And what did you say to him? A. I said, "Leave me alone today. I am here for four or five years and I can do the work and I know what work to do."

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor. (Transcript of Record, fols. 43-46).

The further facts are stated in the foregoing petition.

POINT I.

The Federal Employers Liability Act of April 22, 1908 (35 Stat. Ch. 149; Sec. 1, Mason's United States Code), Title 45, Section 51, made applicable to seamen, by Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250; Section 53, Mason's United States Code) Title 46, Section 688, known as the Jones Law does not extend the employers liability to a willful assault of a workman by his foreman in the absence of negligence.

The United States Circuit Court of Appeals, Second Circuit, on August 19th, 1929, handed down its decision in *Cain* v. *Alpha Steamship Corporation* and although affirming a judgment for the plaintiff refused to follow the decision of the Court of Appeals in *Encarnacion* vs. *Jamison* case, which holds that the Federal Employers

Liability Act extended the Employers responsibility to "misconduct" of its officers, agents and employees. In the course of the opinion, the Circuit Court of Appeals said:

> "In the absence of compelling authority we see no valid reason to extend the fellow servant exception beyond the field of negligence. Even in its restricted scope it has not escaped criticism, and has by statute frequently been curtailed or abolished. It was abolished in respect to negligent injury of railroad employees engaged in interstate commerce by the Federal Employers' Liability Act (35 Stat. 65), and the benefits of that legislation were by the Jones Act extended to seamen who suffer personal injury in the course of their employment (41 Stat. 1007). While the plaintiff's cause of action cannot, in our opinion, be rested upon the Jones Act (compare Encarnacion *v.* Jamison), which by incorporating the Federal Employers' Liability Act requires negligence as the foundation of liability (Ches. & Oh. Ry. Co. *v.* Stapleton, U. S. Sup. Ct. May 27, 1929,) the statutes may appropriately be referred to as showing the legislative tendency already mentioned.
>
> Precise authorities are surprisingly few and unconvincing."

We understand that a Writ of Certiorari will be applied for in the Cain suit.

The Federal Employers Liability Act of April 22nd, 1908 (35 Stat. Ch. 149, Section 1), in clear unequivocal terms makes "negligence" the basis of liability under that act. It provides in part that every common carrier by railroad . . .

> "shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

The Federal Employers Liability Act was passed in 1908. In 1920, the Jones Act was amended extending

the provisions of the Federal Employers Liability Act to seamen. The Jones Law, Merchant Marine Act of June 5th, 1920 (41 Stat. Ch. 250, Section 53), provides that

> "Any seaman who shall suffer personal injuries in the course of his employment may at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States *modifying or extending the common law right or remedy* in cases of personal injury to railroad employees shall apply. (Italics is ours.)

The Court of Appeals has added a cause of action due to misconduct to the Federal Employers' Liability Act.

The Court of Appeals of the State of New York reinstated the verdict for the plaintiff and held

> FIRST: That the plaintiff had no action at common law.
>
> SECOND: That the facts brought the plaintiff under the amendment of the Jones Law and that although no negligence was established, the Federal Employers Liability Act created liability for the mere misconduct of a co-employee in the course of the work.

In passing on the first question, the Court of Appeals said:

> "The learned counsel for the appellant with admirable candor concedes that no fault can be found with the court below for adhering to the rule as thus stated, but he asks this court to change the law 'to establish a better rule of conduct and give place to a higher degree of justice.' Long and firmly established doctrines are not so

easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the court to the actualities of industrial and business life. (*Fitzwater* v. *Warren*, 206 N. Y. 355; *Klein* v. *Maravelas*, 219 N. Y. 383.) The *Gabrielson* case was decided by a divided court with a strong dissent. It has been subjected to much adverse criticism. While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seaman under him is a risk assumed by the seamen for the consequences of which the owners are not responsible (*Gabrielson* v. *Waydell*, 67 Fed. Rep. 342; *The Osceola*, 189 U. S. 158, 175), there remains in it a vestigial remnant of the once all-comprehensive fellow-servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this court if it remains in harmony with recent legislation on the subject."

In holding that the plaintiff made out a case under the Federal Employers' Act, the Court of Appeals said:—

"The admiralty and maritime law is subject to change by Congress. Congress has acted and the Supreme Court of the United States has said broadly (*International Stevedoring Co.* v. *Haverty, supra*) that 'the statutes do away with the fellow-servant rule' as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes necessary to examine the course of legislation on the subject to determine its bearing on our decisions.

The fellow-servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seamen's Act of March 4, 1915 (38 Stat. ch. 153, Sec. 20), it was provided that 'in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under authority.' This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited liability in the case of seamen (*Chelentis* v. *Luckenbach, S. S. Co., 247 U. S. 372*), and was probably appropriate only to the relief of seamen in any event. (*Yaconi* v. *Brady & Gioe, Inc. 246 N. Y. 300.*) It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. ch. 250, Sec. 53; 3 Mason's U. S. Code, tit. 46, ch. 18, Sec. 688, p. 3273), which extends to seamen who shall suffer personal injury in the course of their employment, the rights and remedies given by Congress to railroad empoyees (*Panama R. R. Co.* v. *Johnson, 264 U. S. 375, 389; Baltimore S. S. Co.* v. *Phillips, 274 U. S. 316, 324; Pacific S. S. Co.* v. *Peterson, 278 U. S. 130*) by providing that they may maintain actions against their employers for damages and that in such actions 'all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply' to them. The reference is to the Federal Employers' Act of April 22, 1908 (35 Stat. ch. 149, Sec. 1; 3 Mason's U. S. Code, tit. 45, ch. 2, Sec. 51, p. 3064) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, ch. 121, L.

1921, which applies the vice-principal rule only to cases of negligence.) Nevertheless, Mr. Justice Holmes, writing for the United States Supreme Court in the *Haverty Case* (*supra*) reads the act as doing away with the fellow-servant rule as freely as he reads the word 'seaman' so as to include 'stevedores.' This, it would seem, is its popular interpretation. As the words 'seaman' in the act includes 'stevedores', so the word 'negligence' should 'in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century,' include 'misconduct.' Reading *Gabrielson* v. *Waydell* (*supra*) in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly that Congress, in doing away with the fellow-servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master. (*Mott* v. *Consumers Ice Co. supra*)."

The Federal Employers Liability Act does not add to the common law duties of a master to his servant. The cause of action created results solely from the statutory abrogation of the common law rule exempting the master from liability for the negligence of a fellow servant and, the modification of the common law rule of contributory negligence. The construction placed on this Act by the Court of Appeals creates a new duty on the part of the

master hitherto unknown. It is impossible to find an provision of the Act referring to liability for "miscon duct". If "misconduct" can be read into the Statute, an other word extending the master's liability can equall well be read into the Act, and there is no limitation to th addition of such new rights, if the Court of Appeals open ing up of this novel method of interpreting this Statute i sustained.

Your petitioners' counsel confidently assert that al decisions of all other State and Federal Courts includ ing several in the United States Supreme Court unani mously hold that liability under the Federal Employers Liability Act depends upon proof of negligence.

In

Chesapeake & Ohio R. R. Co. vs. *Stapleton*, 7 Law Ed. 540, decided May 27th, 1929 not ye officially reported,

defendant in error obtained a verdict in a personal in jury action. On the trial he proved no negligent act o omission, but relied solely on the fact that the defendan in error was employed in violation of a State Statut which the State Court had held was negligence as a mat ter of law. In reversing the judgment, this court said:

> "The language of the Federal Employers Lia bility Act shows unmistakably that the basis of re covering is negligence. That without such negli gence no cause of action is given under this Act."

The Federal Employers Liability Act creates a new obligation in the event of negligence and the courts cannot extend such obligation to cover misconduct.

In

Barnet vs. *National Bank*, 98 U. S. 555, 558,

this court said:

> "When a Statute creates a new right or offense and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. Farmers & Mechanics Nat'l. Bank *v.* Dearing, 91 U. S. 29."

In

Shaw vs. Railroad Co., 101 U. S. 557, 561,

this court said:

> "No statute is to be construed as altering the common law further than its words impart. It is not to be construed as making any innovation upon the common law which it does not fairly express."

The Federal Employers Liability Act "unmistakably" bases the employers liability on negligence, and no words can be read into it by implication to extend it beyond its express meaning.

In

Yerke vs. *United States*, 173 U. S. 439, 442,

this court said:

> "The act of 1891 is not ambiguous, its clearness does not need and may not be construed by analogies from other statutes."

See also

Lake Country vs. *Rolkus*, 130 U. S. 662.

In

Kepner v. *United States*, 195 U. S. 100, 125,

this court said:

> "It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."
>
> "And again in ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken, 1 Kent. Com. 336, U. S. *v.* Wong Kin, Ark. 169, U. S. 640."

In

Marvil v. *Merritt Collection*, 116 U. S. 11,

this court said:

> "The words used are not technical either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning. They are words of common speech."

No words extending its application can by implication be read into the statute.

In

United States vs. *B. & O. Southwestern R. R.*, 222 U. S. 8, 13,

this court said:

> "If however there is no ambiguity, the words of the Statute are the measure of its meaning."

See also,

American Express Co. v. *United States*, 212 U. S. 522, 534, 535.
Dewey v. *United States*, 178 U. S. 510, 520.
United States vs. *Chase*, 135 U. S. 255, 261.

The courts may not read additional words into an unambiguous statute on the theory that Congress must have intended to make the statute cover this added subject.

In

Dewey v. *United States*, 178 U. S. 510, 520, 521,

this court said:

> "Of course our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject. There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or destroyed the enemy's vessels in a naval engagement, it is not unreasonable that all the difficulties of every kind, with which they were confronted, while engaging the enemy should be taken into consideration. But that is a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to suppose that it proceeded upon the broad basis suggested when it is expressly declared that the amount of its bounty shall depend upon the question whether 'the enemy Vessel'—not the enemy's vessel and the land, batteries, mines and torpedors, by which it was supported—was inferior or of equal or superior force."

And again

> "This court has nothing to do with questions of mere policy that may be supposed to underlie this action of Congress. What is termed the policy of the government in reference to any particular subject of legislation this court has said "is gen-

erally a very uncertain thing upon which all sorts of opinions each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of Statutes. Hadden *v.* The Collector, 5 Wall. 107, 111. Our province is to declare what the law is, and not under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government so to depart from sound rules of construction as in effect to adjudge that to be the law, which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the Statute involves no absurdity or contradiction and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed. United States *vs.* Fisher, 2 Cranch, 358, 399, Lake County *v.* Rollins, 130 U. S. 662, 670."

In

United States vs. *Chase*, 135 U. S. 255, at p. 261,

referring to the Lewd publications statute, Section 1 of the Act of July 12, 1876, this court said:

"Another argument on which indictments of this character which have been sustained by some of the Circuit Courts is that a reasonable construction must be given the Statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial, whether the thing prohibited is inside or outside an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as important and in ascertaining

> the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the Statute; or implied from a fair interpretation of its context. Even though they may involve the same mischief the statute was designed to suppress."

Citing

> *United States* v. *Sheldon*, 2 Wheat, 119,
> *United States* v. *Wiltberger*, 5 Wheat, 76, 95,
> *United States* v. *Morris*, 14 Peters 464, 475,
> *United States* v. *Hartwill*, 6 Wall, 385,
> *United States* vs. *Reese*, 92 U. S. 214.

In

> *United States* vs. *Goldberg*, 168 U. S. 95, 103,

this court said:

> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the Statute."

In

> *Newhill* v. *Sanger*, 92 U. S. 761, 765,

construing Section 6, Act of March 3rd, 1853, introducing the land system into California (10 Stat. 246), this court said:

> "This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed but there is no authority to import a word into a statute in order to change its meaning."

When Congress by amendment of the Jones Law extended, the rights under the Federal Employers Liability Act to seamen, it thereby ratified the construction of the Courts, that the cause of action erected was founded solely on negligence.

The re-enactment of a statute, by amendment or otherwise, constitutes a ratification of prior judicial construction and in the absence of obvious error, is regarded as read into the re-enactment.

In

New Haven R. R. vs. *Industrial Com. Com.*, 200 U. S. 361, 401, 402,

this court indicated that the decisions of the Court which had construed the statute, might not be in accord with its views of the United States Supreme Court if the question was an original one in that court. But it followed the prior interpretation and said:

> "We concede that the interpretation given by the Commission in these cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute which construction has long obtained in practical execution and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The above decision was approved in

Copper Queen Mining Co. v. *Arizona Board*, 206 U. S. 474, 479,

although this court held that it was not applicable to the facts in the Copper Queen case. This court said:

> "When for a considerable time a statute notoriously has received a construction in practice, from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature unless plainly erroneous, since otherwise naturally the words would have been changed."

Prior to 1920, when the Jones Act extended the application of the Federal Employers Liability Act to seamen, the United States Supreme Court had distinctly held that the Federal Employers Liability Act only extended the Employers Liability where negligence was established.

This amendment of the Jones Act was a re-enactment of the Federal Employers Liability Act and by so doing, Congress ratified and approved the many decisions, limiting the liability thereby created to the precise language of the Act.

In

Seaboard Air Line v. *Horton*, 233 U. S. 492, decided in 1913,

The United States Court held

> "it was the intention of Congress to base the actions upon negligence only and to exclude responsibility of the carrier to its employee for defects and insufficiencies not attributable to negligence."
>
> "To hold that under the Statute the railroad company is liable for injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused is to take from the Act the words 'due to its negligence'. The plain effect of these words is to condition the liability upon negligence."

In

Southern Railway vs. *Gray,* 241 U. S. 333, 339, decided in 1916,

the court said in regard to the Federal Employers Liability Act, reversing a judgment entered upon a verdict for the plaintiff:

> "Negligence by the railway company is essential to a recovery."

Negligence of the Employer or of Its Officers, Agents or Employees Is Essential to a Recovery.

When Congress in 1920 extended to seamen the right of action under the Federal Employers Liability Act, it knew that the State and Federal Courts had consistently held for twelve years that this act only fastened liability on the employer for negligence.

The act itself is clear and unambiguous and bases liability solely on negligence. The decisions of the State and Federal Courts had clearly and without exception limited liability to cases of negligence.

If Congress had desired to give seamen a cause of action, for assault or any "misconduct" not amounting to negligence, it would have done so by the use of some specific language expressing such purpose.

The decision of this court in International Stevedoring Co. v. Haverty, 272 U. S. 50, relied upon by the Court of Appeals as a controlling authority in this court in favor of the cause of action in the suit at bar does not sustain the Court of Appeals' ruling.

In the *Haverty case,* this court held that a stevedore, in loading or unloading a vessel plying in navigable waters, was performing a seaman's work and was there-

fore, classed as a "seaman". This conclusion is founded on a historic review of seamen's duties, which establish that in former times, the seaman performed the work of loading and unloading their vessels, from which fact, this court considered that the segregation of this duty to stevedores did not remove it from the category of seamen's work, and therefore, reached the conclusion that the men performing seamen's work were to be classed as seamen.

Following the same process of reasoning, in the instant case, discloses the error in the Court of Appeals' application of the Haverty decision to this case. The word "assault" is of ancient and definite meaning. The word "negligent" is of less ancient, but no less definite meaning. An "assault" signifies a willful or intentional trespass upon the body of another.

Negligence is the failure to exercise ordinary care whereby another is injured in his person or property.

Since common law times "assault" has meant one thing and "negligence" has meant an entirely different thing.

The act of a stevedore, in loading or unloading a vessel was the same as the act of a sailor doing the same work and so he has been classed as a seaman in the doing of that work. But the act of committing an assault and the act or inaction constituting negligence, have never at common law been regarded as the same thing, but totally different things.

This court in the *Haverty case* applied the rule that

> "things equal to the same thing are equal to each other".

This court in classifying a stevedore as a seaman, added nothing to the Statute. But the Court of Appeals has added to the Statute by inserting the word

> "misconduct".

If the Court of Appeals' decision stands the statute now reads:

> "Every common carrier * * * shall be liable in damages * * * for such injuries * * * resulting * * * from negligence (or misconduct)."

so that by that judicial extension of the Federal Employers Liability Act a new right is accorded employees of common carriers and seamen based on misconduct.

That right, does not depend upon a classification of employees, but solely upon the ipse dixit that Congress must have meant to create a right not mentioned in the act and therefore, the Court of Appeals has added it to the statute.

Gabrielson vs. Waydell, 67 Fed. Rep. 342, Distinguished.

The Court of Appeals cites *Gabrielson* v. *Waydell*, 67 Fed. Rep. 342.

After the Court of Appeals had held that Gabrielson had no common law cause of action in negligence he brought suit in the Federal Court and there obtained a judgment. It should be noted that the Federal Court did not pass on any question of negligence, but based the recovery on Admiralty rules which requires the owner to provide among other things a "seaworthy" vessel. The Court held that an incident of a "seaworthy" vessel was a competent crew, and that the captain who assaulted Gabrielson was shown to be incompetent by reason of his brutal conduct.

This decision, in no way indicates a ruling, contrary to that of the Court of Appeals in the *Gabrielson case.*

It is not out of place to say that the prevailing opinion in the *Gabrielson case* in the Court of Appeals, is far less convincing than the dissenting opinion, which urges that

the well established authority of the master of a vessel to use physical force in disciplining his crew, made the owner liable for a mis-use of this authority. It seems to petitioners' counsel that, this authority to use force, should have subjected the defendant Waydell to liability.

However, although a longshoreman loading or unloading a vessel, is a seaman under the Haverty decision, the employing stevedore and his foreman have not been vested with the authority of a master of a ship.

They have no express or implied authority to use force in keeping the longshoreman at work. So that in the case at bar, the respondent's case is not strengthened, even though the Court of Appeals' decision in the *Gabrielson case* should be overruled.

There is no evidence that the barge the respondent was loading was being used in connection with the loading or unloading of any vessel employing seamen, therefore, he is not shown to have been engaged in seamen's work and is not entitled to the benefits of the Federal Employers Liability Act.

There is no historic background from which to infer that seamen are or even were employed on harbor barges used to carry merchandise around the harbor.

The barge in question had a "captain" who operated it. The merchandise was loaded and unloaded by longshoremen, used solely for that purpose.

The historical review which disclosed that longshoremen loading or unloading a vessel, were doing the work that sailors formerly did, finds no parallel in this case. The respondent was engaged in loading a barge which had no seamen or sailors upon it, and it does not appear that such barges ever carried seamen.

The respondent was, therefore, doing mere longshoreman's work, unconnected with any vessel, employing sea-

men. He therefore is not entitled to the benefits of the Federal Employers' Liability Act, as made applicable to seamen.

Neither the questions of fact submitted by the trial court to the jury nor the law applicable to the facts establish a cause of action under the Federal Employers Liability Act.

CONCLUSION.

Because of the importance of the questions involved to Employers of Seamen and all interstate Railway carriers by the extension of this Act of Congress by the Court of Appeals beyond any construction placed upon this act by this court and in apparent conflict with the Statute and the decisions of this court your petitioners ask that a writ of certiorari be granted.

Respectfully submitted,

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